Supreme Court, U.S.
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No. —

IN THE

Supreme Court of the United States

OCTOBER TERM 1996

BIC CORPORATION,

Petitioner,

v.

ROBERT CARNEY and SHEILA CARNEY,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether a district court's order remanding a case to state court for lack of subject matter jurisdiction is reviewable on appeal when the jurisdictional determination rests on a decision that implicates the federal Constitution.

PARTIES TO THE PROCEEDINGS

Petitioner BIC Corporation was appellant below before the United States Court of Appeals for the Eighth Circuit and petitioner on its petition for rehearing in that court. Respondents Robert Carney and Sheila Carney were appellees. There are no petitioners or respondents in addition to those named in the caption.

Petitioner notes that its parent is Societe BIC, S.A. BIC Corporation owns a majority interest in Industrial de Cuautitlan, S.A. de C.V. and No Sabe Fallar, S.A. de C.V. Aside from those interests, BIC Corporation has no non-wholly owned subsidiaries.

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PETITION FOR CERTIORARI

BIC Corporation ("BIC") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit as described herein.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit that gives rise to this petition (App. 1a) is published at 88 F.3d 629 (8th Cir. 1996). The district court's order remanding this case to state court (App. 8a) is unreported.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit dismissing BIC's appeal from the district court's remand order was entered on July 8, 1996.[1] BIC filed a petition for rehearing and rehearing en banc, and on August 7, 1996, the Court of Appeals denied this petition. App. 12a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the Constitution provides:

> This Constitution, and the laws of the United Sates which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State

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[1] In response to the district court's remand order, BIC simultaneously filed a petition for mandamus and an appeal in the Eighth Circuit. The Eighth Circuit summarily denied BIC's petition for mandamus on November 2, 1995, App. 13a, but then received briefs, heard oral argument, and issued a written opinion on the appeal. Under these circumstances, where the petition for mandamus and the appeal raised the same issues, a petition for certiorari from both decisions is timely filed within ninety days of the Court of Appeals' decision on the appeal, whether mandamus or appeal is the proper avenue for appellate court review. *See Mercer v. Theriot*, 377 U.S. 152, 153 (1964).

shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. Art. VI, clause 2.

The federal removal statute provides in part:

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a state court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

28 U.S.C. § 1441(a).

The removal statute also provides:

An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

28 U.S.C. § 1447(d).

The Missouri statute involved provides in pertinent part:

537.762. Motion to dismiss, defendant whose only liability is as seller in stream of commerce, requirements, procedure — order of dismissal to be interlocutory.

1. A defendant whose liability is based solely on his status as a seller in the stream of commerce may be dismissed from a products liability claim as provided in this section.

* * *

6. No order of dismissal under this section shall operate to divest a court of venue or jurisdiction otherwise proper at the time the action was commenced. A defendant dismissed pursuant to this section shall be considered to remain a party to such action only for such purposes.

Rev. Stat. Mo. § 537.762 (1987) (full text at App. 14a).

STATEMENT OF THE CASE

Petitioner BIC was sued by respondents Robert Carney and Sheila Carney in the Circuit Court for the City of St. Louis on July 28, 1994. Respondents alleged products liability with respect to a butane lighter manufactured by BIC, and they also named as a defendant the local retailer who allegedly sold the lighter, Clifford Massie d/b/a Massie One Stop. BIC is a New York corporation with its principal place of business in Connecticut. Respondents and Massie were residents of Missouri.

In the state court, respondents and Massie agreed to a stipulation dismissing Massie from the case. App. 11a. BIC did not participate in that agreement. The stipulation stated that "Defendant Clifford Massie, d/b/a Massie One Stop . . . shall remain a party to this action only for the purposes of venue and jurisdiction as provided in R.S.Mo. 537.762(6) (1987)." No order of dismissal was ever entered.

Based on the stipulated dismissal of Massie, BIC removed this case to the United States District Court for the Eastern District of Missouri on March 3, 1995. In its removal papers, BIC pointed out that the dismissal of the non-diverse retailer created diversity jurisdiction between the remaining parties, respondents and BIC. On March 9, 1995, respondents moved to remand, arguing that Massie remained in the case for purposes of jurisdiction under the Missouri statute and the stipulation.

In opposition to respondents' motion to remand, BIC argued, *inter alia*, that the construction of the Missouri statute sought by respondents would be constitutionally invalid because it would allow a state statute to destroy federal subject matter jurisdiction. In an Order filed July 14, 1995 (App. 10a), the district court granted respondents' motion to remand. The district court ruled that Massie remained a party to the litigation for purposes of jurisdiction because of Rev. Stat. Mo. § 537.762 and stated, without explanation or citation of authority, "[t]he Court is not persuaded by BIC's contention that § 537.762.6 is an

impermissible attempt by state law to defeat removal jurisdiction[.]" App. 9a.

On appeal to the Eighth Circuit, BIC argued, *inter alia*, that the district court's remand order was reviewable under the rule set forth in *Waco v. U.S. Fidelity & Guaranty Co*, 293 U.S. 140 (1934) because the order was based on a decision on the merits of a collateral issue, *i.e.*, the effect of the Missouri statute.[2] BIC also argued that the district court's (erroneous) interpretation of the Missouri statute, which allowed respondents and Massie to stipulate away federal subject matter jurisdiction, made the statute "an impermissible attempt to oust federal jurisdiction," and thus unconstitutional under the Supremacy Clause (citing, *e.g.*, *Railway Co. v. Whitton's Administrator*, 80 U.S. (13 Wall.) 270 (1872)).

The Eighth Circuit dismissed BIC's appeal for lack of jurisdiction under 28 U.S.C. § 1447(d). The Eighth Circuit rejected BIC's argument derived from *Waco* on the ground that the district court's ruling was not separable from its jurisdictional determination but rather was "necessary to determine whether such jurisdiction existed." App. 6a (quotation omitted). The Eighth Circuit acknowledged BIC's argument that "the [Missouri] statute is invalid to the extent that it limits diversity jurisdiction," App. 4a., but considered this argument as going to "the merits," which it refused to address.

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[2] On this issue, BIC argued that the Missouri statute did not apply to this case because (1) the statute by its terms requires a court order to effect its peculiar partial dismissal of a retailer defendant, but no order was ever entered by the state court, and (2) the language and legislative history of the statute make clear that it was intended only to address a matter of procedure in the Missouri courts, and was not intended to affect federal court jurisdiction. For purposes of this petition, however, the district court's construction of the Missouri statute is controlling and the proper interpretation of the statute is not at issue.

REASONS FOR GRANTING THE PETITION

The reviewability of remand decisions is a constantly recurring and important issue in the federal courts. While 28 U.S.C. § 1447(d) appears on its face to bar review of all but a small category of remand orders, the decisions of this Court and the courts of appeals in fact allow review in a significant proportion of cases. This case presents a conflict in the federal courts of appeals over an exception to non-reviewability for remand orders where the remand turns on the determination of a federal constitutional issue. This case squarely presents the constitutional issue exception because the district court's interpretation of the Missouri statute violates the Supremacy Clause by allowing a state statute directly to destroy federal subject matter jurisdiction, and the Eighth Circuit held that it lacked appellate jurisdiction even though that constitutional issue was presented to it for review.

A. THE REVIEWABILITY OF DISTRICT COURT REMAND ORDERS IS A FREQUENTLY RECURRING ISSUE THAT IMPLICATES IMPORTANT FEDERAL INTERESTS

Whether district court remand decisions are reviewable on appeal is an issue that arises constantly in the federal system. A search of the Westlaw computer database shows that the federal district courts issued 84 published remand opinions (either in book form or on-line) in less than ten months in 1996 alone, and hundreds more undoubtedly took the form of conclusory orders that were never published. The right of defendants to remove a case to federal court where federal jurisdiction exists is an important federal right. The proper interpretation of 28 U.S.C. § 1447(d) thus is an important and frequently arising issue.

28 U.S.C. § 1447(d) purports to bar appellate review of virtually all district court remand orders. In practice, however, it is not unusual for remand orders to be reviewed by the courts of appeals. In *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1975), this Court concluded that the bar to review imposed by § 1447(d) is limited to remands on the grounds stated in 28 U.S.C. § 1447(c), though on its face the statute contains no

statement to that effect. The remand in *Thermtron* was held reviewable because it was based on the district court's crowded docket, which is not a basis specified in § 1447(c).

Following *Thermtron*, remand orders appear clearly to be reviewable where they rest on a discretionary decision by the district court, since such orders do not involve the grounds stated in § 1447(c). *See, e.g., Carnegie-Mellon University v. Cohill*, 484 U.S. 343 (1988) (holding that district courts have discretion to remand pendent state claims); *Mangold v. Analytic Services, Inc.*, 77 F.3d 1442 (4th Cir. 1996) (remand order based on district court's belief that it had discretion to remand state-law claims was reviewable); *PAS v. Travelers Insurance Co.*, 7 F.3d 349 (3d Cir. 1993) (remand based on district court's discretion to decline to exercise supplemental jurisdiction was reviewable); *McDermott International, Inc. v. Lloyd's Underwriters of London*, 944 F.2d 1199 (5th Cir. 1991) (discretionary remand order based on the parties' insurance contract was reviewable by appeal).

Jurisdiction to review remand orders on appeal also exists where remand turns on an antecedent ruling which is itself subject to review. *See Waco v. U.S. Fidelity & Guaranty Co*, 293 U.S. 140, 143 (1934) (dismissal of third-party defendant was reviewable on appeal where "in logic and in fact the decree of dismissal preceded that of remand and was made by the District Court while it had control of the cause"); *Pelleport Investors, Inc. v. Budco Quality Theaters, Inc.*, 741 F.2d 273, 277 (9th Cir. 1984) (reasoning from *Waco* that § 1447(d) does not apply, and remand orders are reviewable, if remand is mandated by a substantive decision on the merits apart from the jurisdictional determination, *e.g.*, a forum-selection agreement); *Carr v. American Red Cross*, 17 F.3d 671, 682-83 (3d Cir. 1994) ("where a separable and final determination has been made by the district court, whether substantive or jurisdictional, which determination triggers a remand, we will review both the underlying final order and the remand order itself").

While these rules of thumb appear to allow review of certain remand orders in a manner consistent with *Thermtron*, there are

also respects in which the federal courts have behaved inconsistently in determining the reviewability of remand orders. For example, the courts of appeals vary widely in their willingness to scrutinize remand decisions to determine if the remand actually was based on a lack of federal subject matter jurisdiction. *Compare, e.g., Richards v. Federated Dept. Stores, Inc.*, 812 F.2d 211, 211 (5th Cir.) (remand orders "which recite the magic words" of "improvidently and without jurisdiction" are not reviewable "at all") (per curiam), *cert. denied sub nom. Sanger-Harris v. Richards*, 484 U.S. 824 (1987) *with Mangold v. Analytic Services, Inc.*, 77 F.3d at 1450 (appellate court must "look past contextually ambiguous allusions and even specific *citations* to § 1447(c) to determine by independent review of the record the actual grounds or basis [of the remand]") (emphasis in original); *In re First National Bank of Boston*, 70 F.3d 1184, 1189 n.4 (11th Cir. 1995) (to defer to "magic words" "would establish a review standard that would preserve and perpetuate similar abuses of discretion by district courts and preclude our review").

B. THERE IS A CONFLICT IN THE CIRCUITS AND SUBSTANTIAL UNCERTAINTY IN THE LAW CONCERNING THE REVIEWABILITY OF REMAND ORDERS THAT TURN ON FEDERAL CONSTITUTIONAL ISSUES

Separate and apart from *Thermtron* and these exceptions to non-reviewability that follow from it, an exception to non-reviewability has been recognized where the remand decision itself turns on the resolution of a federal constitutional issue. This exception was first recognized in *In Re TMI Litigation Cases Consolidated II,* 940 F.2d 832 (3d Cir. 1991), *cert. denied*, 503 U.S. 906 (1992), where the district court remanded the case to state court after determining that it lacked federal subject matter jurisdiction. That determination, in turn, was based on the district court's "conclusion that the [Price-Anderson Amendments Act of 1988, 42 U.S.C. § 2011 *et seq.*] itself was unconstitutional[.]" *Id.* at 835. The Third Circuit reversed the consti-

tutional determination after concluding that it had jurisdiction to review the remand order:

> Such constitutional determinations could not have been intended by Congress to fall within the category of routine subject matter jurisdiction determinations contemplated by section 1447(c) and, consequently, are not immune from review under section 1447(d).

Id. at 848.

The constitutional issue exception has been acknowledged by other circuits as well. For example, in *Baldridge v. Kentucky-Ohio Transportation Inc.*, 983 F.2d 1341 (6th Cir. 1993), the Sixth Circuit accepted that the exception is based on the "entirely defensible view" that "Congress did not intend to vest the district courts with the authority to make final determinations regarding the constitutionality of federal statutes." *Id.* at 1345 (internal quotations omitted). *See also Krangel v. General Dynamics Corp*, 968 F.2d 914, 916 (9th Cir. 1992) (acknowledging the existence of the exception).

By contrast, in this case the Eighth Circuit squarely rejected BIC's argument that the district court's remand order was reviewable because the district court gave the Missouri statute a construction that violates the Supremacy Clause.[3] The Eighth Circuit treated BIC's argument as addressing "the merits" and held that it could not consider the issue because under 28 U.S.C.

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[3] Specifically, BIC argued to the district court, citing Supreme Court and numerous court of appeals' decisions based on the Supremacy Clause, that "[a]s interpreted by Plaintiffs' attorney, Section 537.762(6) and (7) operate to prevent or defeat the right of Defendant BIC to remove this case . . . . It has long been the [constitutional] rule that a state may not interfere with federal jurisdiction." BIC's Memorandum in Opposition to Plaintiffs' Motion to Remand at 3. Likewise, in the Eighth Circuit BIC argued that "[t]o the extent the Missouri venue statute is interpreted to oust federal jurisdiction, it is invalid." Appellant's Br. at 25 (citing, *e.g.*, *Railway Company v. Whitton's Administrator*, 80 U.S. (13 Wall.) 270 (1871) and *Goldey v. Morning News*, 156 U.S. 518, 523 (1895)).

§ 1447(d) it lacked jurisdiction to review the remand order. App. 4a. The Eighth Circuit thus rejected the constitutional issue exception as a basis for review of remand orders.

At present, there is genuine uncertainty in the federal courts as to whether remand orders resting on the decision of federal constitutional issues are subject to review by an appellate court. Not only the decision in this case, but a literal application of the *Thermtron* rule would suggest that no such review is available where, as in *TMI*, the resolution of the constitutional issue had the effect of defeating federal court jurisdiction. On the other hand, *Thermtron* did not involve, and did not specifically purport to address, a situation where the federal constitutional question is determinative of jurisdiction, and thus of the remand. And, as the Third Circuit recognized in *TMI*, there are very compelling reasons to uphold the reviewability of constitutionally-based remand decisions.[4]

Since the early days of the Republic, it has been clear that this Court is the ultimate interpreter of the provisions of the Constitution, and of the ways in which those provisions constrain the legislation and conduct of the federal and state governments. That can be no less true where a constitutional ruling is determinative of a remand decision, than where it leads to a broader resolution of the merits of a case. It cannot be the law that where a district court's invalidation of a federal or state statute comes in the course of a remand to state court, it is immunized from review by a higher court. To so conclude would disable the process by which this Court is able to bring coherence

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[4] See Hart and Wechsler, *The Federal Courts and the Federal System* 1667-68 & n.3 (4th ed. 1996) (asking rhetorically whether § 1447(d) could have been "drafted [in] clearer language," but also noting that "*Thermtron* has served as the basis for a number of appellate decisions permitting review of remand orders in situations that, at the least, raise difficult questions of interpretation under § 1447(d)," citing, *e.g.*, *TMI*).

and consistency to constitutional jurisprudence.[5] Yet, absent an exception from the non-reviewability rule for constitutionally-based remand decisions, that is precisely the result that follows from *Thermtron*. As the court stated in *TMI*:

> Because remand orders premised upon section 1447(c) are absolutely unreviewable, on appeal or otherwise, a district court's constitutional determination, if couched in terms of section 1447(c) and followed by a remand order, could *never* be reviewed.

940 F.2d at 845 (emphasis in original).[6]

The unacceptability of this conclusion is most obvious where a district court has in fact struck down a federal or state statute on federal constitutional grounds. The creation of such unreviewable precedents of legislative invalidation, with binding effect in the districts where decided and persuasive effect elsewhere, cannot be squared with basic notions of constitutional jurisprudence and

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[5] *See, e.g., Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 348 (1816) ("if there were no revising authority to control these jarring and discordant judgments [of multiple state courts], and harmonize them into uniformity, the laws, the treaties and the constitution of the United States would be different, in different states . . . . The public mischiefs that would attend such a state of things would be truly deplorable[.]"); Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1365 (1953) (arguing that Article III of the Constitution prohibits Congress from making such exceptions to Supreme Court appellate jurisdiction "as will destroy the essential role of the Supreme Court in the constitutional plan"); Bator, *Withdrawing Jurisdiction from Federal Courts*, 7 Harv. J. L. & Pub. Pol'y 31, 32 (1984) (arguing that proposals to withdraw jurisdiction from the Supreme Court would strip the nation of the "authoritative law-giver" needed for a "viable society").

[6] Presumably, a conclusion that § 1447(d) applies to constitutionally-based remand orders, as to other orders, thus rendering them "not reviewable on appeal or otherwise," also would foreclose review by this Court.

separation of powers. Reviewability is likewise critical where, as here, the decision to remand rests on the rejection of federal constitutional arguments. This Court's authority to define and enforce the Constitution's guarantees must extend to remand orders, and that authority cannot be made to turn on whether those guarantees have been upheld or rejected by the court below.

C. THIS CASE SQUARELY PRESENTS THE QUESTION WHETHER REMANDS BASED ON THE DETERMINATION OF CONSTITUTIONAL ISSUES ARE SUBJECT TO APPELLATE REVIEW

In this case, the Eighth Circuit concluded that it lacked jurisdiction to review a district court remand decision even though that decision turned on resolution of BIC's constitutional challenge to a state statute as construed by the district court. The district court interpreted the Missouri statute so as to permit two of the parties to this case to stipulate away federal diversity jurisdiction. This decision was inconsistent with the federal removal statute, 28 U.S.C. § 1441, and a gross violation of the Supremacy Clause, and BIC presented that contention in unmistakable terms to the courts below.

It is too well-established to be disputed that state laws cannot directly interfere with federal jurisdiction, including federal jurisdiction on removal. As long ago as *Railway Company v. Whitton's Administrator*, 80 U.S. (13 Wall.) 270 (1872), removal was objected to on the ground that a Wisconsin statute dictated that wrongful death actions must be brought in state courts. This Court held that the forum-limitation clause of the state statute was ineffective, saying:

> In all cases, where a general right is thus conferred, it can be enforced in any Federal court within the state having jurisdiction of the parties. It cannot be withdrawn from the cognizance of such federal court by any provision of state legislation that it shall only be enforced in a state court. . . . Whenever a general rule as to property or personal rights, or injuries to either, is established by state legislation, its enforcement by a federal court in a case between proper parties is a matter of

> course, and the jurisdiction of the court, in such case, is not subject to state limitation.

Id. at 286.

Many cases subsequent to *Whitton* have reiterated that state statutes cannot be permitted to interfere with federal removal jurisdiction. *See, e.g., Goldey v. Morning News,* 156 U.S. 518, 523 (1895) (federal jurisdiction "cannot be enlarged or abridged by any statute of a State. The legislature or the judiciary of a State can neither defeat the right given by a constitutional act of Congress to remove a case from a court of the State . . ., nor limit the effect of such removal."); *Terral v. Burke Const. Co.*, 257 U.S. 529, 532 (1922) ("the federal Constitution confers upon citizens of one State the right to resort to federal courts in another, [and] state action, whether legislative or executive, necessarily calculated to curtail the free exercise of the right thus secured is void" under the Supremacy Clause); *International Insurance Co. v. Duryee*, 96 F.3d 837, 838 (6th Cir. 1996) (Ohio statute that effectively prohibits out-of-state insurance companies from removing cases to federal court, by barring them from further business in Ohio if they attempt to remove, directly conflicts with the federal removal statute in violation of the Supremacy Clause).

While Rev. Stat. Mo. § 537.762 may be valid as an exercise of Missouri's authority over its own courts, the district court here interpreted the statute to authorize two of the parties to stipulate away federal diversity jurisdiction on removal. This construction of the Missouri statute makes it a direct interference with federal removal jurisdiction. If plaintiffs are permitted to destroy federal jurisdiction by the artifice of keeping phantom defendants in a case not for determining liability against them, but solely to destroy complete diversity in a manner analogous to fraudulent joinder, then the federal right of removal will be largely nullified. In this circumstance, an exception to the rule of non-reviewability of remand orders must exist in order to allow limited review of the constitutional issue presented.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari, raising the question whether the Eighth Circuit had jurisdiction to review a remand order that was based on the district court's determination of the constitutional question presented to it, should be granted.

Respectfully submitted,

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November 1, 1996

UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

No. 95-3163.

ROBERT CARNEY; SHEILA CARNEY, Appellees, v. BIC CORPORATION, Appellant.	* Appeal From The * United States * District Court For * The Eastern District * Of Missouri *

Submitted: April 10, 1996
Decided: July 8, 1996.

Before McMILLIAN and FAGG, Circuit Judges, and BURNS,* District Judge.

McMILLIAN, Circuit Judge.

BIC Corporation (BIC) appeals from a final order entered in the United States District Court[1] for the Eastern District of Missouri remanding to Missouri state court for want of federal jurisdiction the products liability action brought by Robert Carney and Sheila Carney, husband and wife (collectively plaintiffs) against BIC. *Carney v. BIC Corp.*, No. 4:95CV417-DJS (E.D.Mo. July 14, 1995) (Order). For reversal, BIC argues that the district court erred in holding that it lacked removal jurisdiction to entertain plaintiffs' action after the stipulated

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*The Honorable James M. Burns, United States District Judge for the District of Oregon, sitting by designation.

[1] The Honorable Donald J. Stohr, United States District Judge for the Eastern District of Missouri.

dismissal of defendant Clifford Massie, d/b/a Massie One Stop (Massie), pursuant to Mo.Rev.Stat. § 537.762. For the reasons discussed below, we dismiss the appeal pursuant to 28 U.S.C. § 1447(d) for lack of jurisdiction.

I. Background

The underlying facts are not in dispute. Plaintiffs' two-year-old son died on January 30, 1992, because of injuries sustained while attempting to use a butane lighter manufactured by BIC. On July 28, 1994, plaintiffs filed the present wrongful death and personal injury action in the Circuit Court of the city of St. Louis against BIC and Massie, a commercial retailer who had sold the lighter to plaintiffs. BIC is incorporated in New York and has its principal place of business in Connecticut. At the time the present action was commenced, however, plaintiffs and Massie were residents of the State of Missouri. Therefore, diversity of citizenship did not exist between the parties when plaintiffs filed their complaint against BIC and Massie.

On January 11, 1995, Massie filed a motion seeking dismissal from plaintiffs' complaint pursuant to Mo.Rev.Stat. § 537.762 (1987).[2] As required by § 537.762(3), Massie's motion to

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[2] Mo.Rev.Stat. § 537.762 provides as follows: 537.762. Motion to dismiss, defendant whose liability is as seller in stream of commerce, requirements, procedure—order of dismissal.

1. A defendant whose liability is based solely on his status as a seller in the stream of commerce may be dismissed from a products liability claim as provided in this section.

2. This section shall apply to any products liability claim in which another defendant, including the manufacturer, is properly before the court and from whom total recovery may be had for plaintiffs' claim.

3. A defendant may move for dismissal under this section within the time for filing an answer or other responsive pleading unless permitted by the court at later time shown.

dismiss was accompanied by an affidavit stating that he was aware of no facts or circumstances supporting his liability other than his status as a seller in the stream of commerce. On February 23, 1995, plaintiffs and Massie entered into a stipulation of dismissal, which provided that Massie "shall remain a party to this action only for the purposes of venue and jurisdiction as provided in ... § 537.762(6) (1987)." App. 71.

On March 3, 1995, BIC removed the present case to the United States District Court for the Eastern District of Missouri, alleging that the stipulated dismissal of Massie had created diversity of citizenship between the parties. Upon motion by plaintiffs, the district court entered an order remanding the case

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4. The parties shall have sixty days in which to conduct discovery on the issues raised in the motion and affidavit. The court for good cause shown, may extend the time for discovery, and may enter a protective order pursuant to the rules of civil procedure regarding the scope of discovery on other issues.

5. Any party may move for a hearing on a motion to dismiss under this section. If the requirements of subsections 2 and 3 of this section are met, and no party comes forward at such hearing with evidence of facts which would render the defendant seeking dismissal under this section liable on some basis other than his status as a seller in the stream of commerce, the court shall dismiss without prejudice the claim as to that defendant.

6. No order of dismissal under this section shall operate to divest a court of venue or jurisdiction otherwise proper at the time the action was commenced. A defendant dismissed pursuant to this section shall be considered to remain a party to such action only for such purposes.

7. An order of dismissal under this section shall be interlocutory until final disposition of plaintiff's claim by settlement or judgment and may be set aside for good cause shown at anytime prior to such disposition.

Mo.Rev.Stat. § 537.762 (1987) (emphasis added).

to the Circuit Court of the City of St. Louis on July 14, 1995. This appeal followed.[3]

II. Discussion

The district court determined that a remand order was appropriate in the present case because the dismissal of Massie did not create removal jurisdiction based upon the diversity of the parties. In reaching this conclusion, the district court noted that the stipulation of dismissal expressly stated that Massie would remain a party to the action for the purpose of venue and jurisdiction, in accordance with § 537.762(6). The district court also held that § 537.762 was not, as BIC argued, an "impermissible attempt by state law to defeat removal jurisdiction." Slip op. at 2.

On appeal, BIC contends that the district court erred in remanding the present action to Missouri state court, because (1) § 537.762 does not apply where a co-defendant is dismissed by stipulation rather than by order and (2) § 537.762 was never intended to affect federal diversity jurisdiction, or alternatively, the statute is invalid to the extent that it limits diversity jurisdiction. We may not address the merits, however, unless we determine that we have jurisdiction to review the district court's remand order. Title 28 U.S.C. § 1447(d) provides that, with the exception of civil rights case, "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise." In *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 346, 96 S.Ct. 584, 590, 46 L.Ed.2d 542 (1976) (*Thermtron*), the Supreme Court clarified that "only remand orders issued under § 1447(c)[4] and invoking the grounds

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[3] BIC also filed a petition for writ of mandamus on August 21, 1995. This court denied the petition on November 2, 1995.

[4] 28 U.S.C. § 1447(c) currently provides in pertinent part: "If at any time it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." At the time the Supreme Court decided *Thermtron*, however, § 1447(c) stated that "[i]f at any time before final judgment it appears that the case was removed improvidently and

specified therein ... are immune from review under § 1447(d)". *Id.* In *Thermtron*, the district court had remanded an otherwise proper diversity action solely because of its crowded docket. Concluding that the district court had exceeded its statutorily defined power by remanding the case on a basis not specified in § 1447(c), the Supreme Court held that a writ of mandamus was the appropriate remedy to compel the district court to entertain the action. *Id.* at 352-53, 96 S.Ct. at 593-95.

BIC contends that the present case falls within the *Thermtron* exception because the district court's remand order was not based upon a ground specified in 28 U.S.C. § 1447(c)—i.e., the lack of subject matter jurisdiction—but rather, was premised upon Mo.Rev.Stat. § 537.762(6), which provides that retailers who have been dismissed from products liability actions on the basis that their liability stems solely from their status as sellers in the stream of commerce shall remain defendants for purposes of venue and jurisdiction. In addition to *Thermtron*, BIC relies on *Karl Koch Erecting Co. v. New York Convention Center Dev. Corp.*, 838 F.2d 656, 658-59 (2d Cir. 1988) (*Karl Koch*). In *Karl Koch*, the Second Circuit held that a remand order based on the district court's interpretation of a forum selection clause was reviewable because the district court had gone beyond the jurisdictional determination and made a decision affecting the merits of the case. *See id.* (reasoning that the policy underlying 28 U.S.C. § 1447(d)—preventing protracted litigation of jurisdictional questions—was inapplicable to remand orders based upon interpretation of forum selection clause); *see also Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.*, 741 F.2d 273, 277 (9th Cir. 1984) (holding that remand order based on enforceability of forum selection clause was reviewable).

In response, plaintiffs argue that 28 U.S.C. § 1447(d) forecloses review of the remand order, because the order was based upon the district court's determination that, in light of Mo.Rev.Stat. § 537.762(6), it lacked removal jurisdiction to entertain plaintiffs'

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without jurisdiction, the district court shall remand the case."

action. Plaintiffs also maintain that the present case more closely resembles *Hansen v. Blue Cross*, 891 F.2d 1384, 1388 (9th Cir. 1989) (*Hansen*), than *Karl Koch*. In *Hansen*, the Ninth Circuit held unreviewable a remand order based upon the district court's determination that the insurance plan at issue was not subject to ERISA. *Id.* The Ninth Circuit reasoned that the remand order did not fall within the *Thermtron* exception because "[t]he district court's decision that Hansen's plan was not subject to ERISA, rather than being apart from the question of subject matter jurisdiction, was necessary to determine whether such jurisdiction existed." *Id.* Plaintiffs argue that the reasoning of *Hansen* also applies in the present case. We agree and hold that the district court's remand order is not reviewable on appeal.

We are bound by the general rule of non-reviewability of remand orders set forth in 28 U.S.C. § 1447(d). The remand order in the present case does not come within the *Thermtron* exception, because it was based on a ground specified in 28 U.S.C. § 1447(c)—the district court's determination that it lacked subject matter jurisdiction to hear the action. After noting that the stipulated dismissal provided that, in accordance with Mo.Rev.Stat. § 537.762(6), Massie would remain a party in the action for purposes of venue and jurisdiction, the district court concluded that the dismissal of Massie did not create removal jurisdiction based upon diversity of citizenship and remanded the present case to Missouri state court. Thus, the remand order was based solely upon the district court's conclusion that removal jurisdiction did not exist. Although the district court applied Mo.Rev.Stat. § 537.762(6) in reaching this conclusion, its consideration of § 537.762(6) was in no way separate from the jurisdictional determination. Therefore, the present case is distinguishable from *Karl Koch*, in which the remand order at issue was based upon a matter affecting the merits of the case. By contrast, the district court in the present case made no determinations concerning the substantive rights of the parties. Thus, the remand order falls squarely within 28 U.S.C. § 1447(d) and is foreclosed from appellate review.

III. Conclusion

We hold that the district court's order remanding the present case to the Circuit Court of the City of St. Louis is unreviewable on appeal.[5] Accordingly, we dismiss the appeal pursuant to 28 U.S.C. § 1447(d) for lack of jurisdiction.

---

[5] Thus, we do not reach the merits of BIC's challenge to the remand order.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

ROBERT CARNEY and SHEILA CARNEY,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 4:95CV
	)	417-DJS
	)	
BIC CORPORATION and CLIFFORD MASSIE d/b/a MASSIE ONE STOP,	)	
	)	
	)	
Defendants.	)	

ORDER

Plaintiffs filed the instant product liability action in the Circuit Court of the City of St. Louis against the manufacturer and retailer of a BIC butane lighter, seeking damages relating to the death of their two-year-old son. Section 537.762 R.S.Mo. provides for the dismissal from a product liability action of a defendant "whose liability is based solely on his status as a seller in the stream of commerce" so long as there remains a claim against "another defendant, including the manufacturer, ...from whom total recovery may be had for plaintiff's claim." Following dismissal of defendant Clifford Massie pursuant to § 537.762, defendant BIC Corporation removed the action to this Court on the basis of diversity. The matter is now before the Court on plaintiffs' motion to remand.

The propriety of removal turns on interpretation of subsection 6 and 7 of § 537.762, which provide as follows:

> 6. No order of dismissal under this section shall operate to divest a court of venue or jurisdiction otherwise proper at the time the action was commenced. A defendant dismissed

> pursuant to this section shall be considered to remain a party to such action only for such purposes.
>
> 7. An order of dismissal under this section shall be interlocutory until final disposition of plaintiff's claim by settlement or judgment and may be set aside for good cause shown at any time prior to such disposition.

Defendant Massie's dismissal in this case was pursuant to a stipulation of the parties which reads in pertinent part:

> By consent of the undersigned parties, Defendant Clifford Massie d/b/a Massie One Stop is hereby voluntarily dismissed from this action as provided in and pursuant to R.S.Mo. § 537.762 (1987) and shall remain a party to such action only for the purpose of venue and jurisdiction as provided in R.S.Mo. § 537.762(6) (1987).

The Court is not persuaded by BIC's contention that § 537.762.6 is an impermissible attempt by state law to defeat removal jurisdiction, analogous to those attempts which have been rejected in the case law upon which BIC relies. Furthermore, the Court concludes that the interlocutory nature of the dismissal pursuant to § 537.762 renders the voluntary-involuntary dismissal distinction insignificant in this context and makes a removal relying on the dismissal improper. The Court's construction and application of the Missouri statute is also in accordance with the general principle that the federal courts' removal jurisdiction is to be narrowly construed and any doubts should be resolved in favor of remand. *See, e.g.*, 14A Wright, Miller & Cooper, *Federal Practice & Procedure: Jurisdiction 2d* § 3721 (1985).

Accordingly,

IT IS HEREBY ORDERED that plaintiffs' motion to remand is granted.

IT IS FURTHER ORDERED that this matter be remanded to the Circuit Court of the City of St. Louis.

/s/ Donald J. Stohr
UNITED STATES DISTRICT JUDGE

Dated: 7/14/95

[Filed Feb. 24, 1995]

THE CIRCUIT COURT OF THE CITY OF ST. LOUIS
STATE OF MISSOURI

ROBERT CARNEY and SHEILA CARNEY,	)	
	)	
Plaintiff,	)	
	)	Cause No.
vs.	)	942-9338
	)	Division 1
BIC CORPORATION and CLIFFORD MASSIE d/b/a MASSIE ONE STOP,	)	
	)	
	)	
Defendants.	)	

STIPULATION FOR DISMISSAL

By consent of the undersigned parties, Defendant Clifford Massie d/b/a Massie One Stop is hereby voluntarily dismissed from this action as provided in and pursuant to R.S.Mo. § 537.762 (1987) and shall remain a party to such action only for the purpose of venue and jurisdiction as provided in R.S.Mo. § 537.762(6) (1987).

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 95-3163EMSL

ROBERT CARNEY; SHEILA CARNEY, Appellees,	*	Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc
v.	*	
BIC CORPORATION, Appellant.	*	

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

August 7, 1996

Order Entered at the Direction of the Court:

/s/ Michael E. Gans
Clerk, U.S. Court of Appeals,
Eighth Circuit.

UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

No. 95-3084EMSL

In re:	*	
Bic Corporation,	*	
	*	
Petitioner.	*	Petition for Writ of
	*	Mandamus
	*	
	*	

JUDGEMENT

Petition for writ of mandamus has been considered by the court and is denied.

November 2, 1995

Order Entered at the Direction of the Court:

/s/ Michael E. Gans
Clerk, U.S. Court of Appeals,
Eighth Circuit.

RELEVANT MISSOURI STATUTE

537.762

Motion to dismiss, defendant whose only liability is as seller in stream of commerce requirements, procedure — order of dismissal to be interlocutory

1. A defendant whose liability is based solely on his status as a seller in the stream of commerce may be dismissed from a products liability claim as provided in this section.

2. This section shall apply to any products liability claim in which another defendant, including the manufacturer, is properly before the court and from whom total recovery may be had for plaintiffs' claim.

3. A defendant may move for dismissal under this section within the time for filing an answer or other responsive pleading unless permitted by the court at later time for good cause shown. The motion shall be accompanied by an affidavit which shall be made under oath and shall state that the defendant is aware of no facts or circumstances upon which a verdict might be reached against him, other than his status as a seller in the stream of commerce.

4. The parties shall have sixty days in which to conduct discovery on the issues raised in the motion and affidavit. The court for good cause shown, may extend the time for discovery, and may enter a protective order pursuant to the rules of civil procedure regarding the scope of discovery on other issues.

5. Any party may move for a hearing on a motion to dismiss under this section. If the requirements of subsections 2 and 3 of this section are met, and no party comes forward at such a hearing with evidence of facts which would render the defendant seeking dismissal under this section liable on some basis other than his status as a seller in the stream of commerce, the court shall dismiss without prejudice the claim as to that defendant.

6. No order of dismissal under this section shall operate to divest a court of venue or jurisdiction otherwise proper at the time the action was commenced. A defendant dismissed pursuant to

this section shall be considered to remain a party to such action only for such purposes.

7. An order of dismissal under this section shall be interlocutory until final disposition of plaintiff's claim by settlement or judgment and may be set aside for good cause shown at anytime prior to such disposition.

Supreme Court, U.S.
F I L E D
DEC 4 1996

No. 96-694

In The

Supreme Court of the United States

October Term, 1996

BIC CORPORATION,

Petitioner,

vs.

ROBERT CARNEY and SHEILA CARNEY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether a district court's order remanding a case to state court is reviewable on appeal when the remand order is based on a lack of diversity and subject matter jurisdiction, which is a ground specified in 28 U.S.C. § 1447(c).

PARTIES TO THE PROCEEDINGS

Respondents adopt the list of parties to the proceedings contained in the Petition.

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Robert Carney and Sheila Carney, respondents, respectfully request that certiorari be denied.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit (App. 1a)* dismissing BIC Corporation's appeal pursuant to 28 U.S.C. § 1447(d) for lack of jurisdiction is published at 88 F.3d 629 (8th Cir. 1996). The order of the United States District Court for the Eastern District of Missouri remanding this case to state court due to lack of diversity and subject matter jurisdiction is unreported.

STATEMENT OF JURISDICTION

Although the jurisdiction of this Court is being invoked under 28 U.S.C. § 1254, the Considerations Governing Review on Certiorari specified in Rule 10 of the Rules of the Supreme Court of the United States are absent and the decision of the Eighth Circuit Court of Appeals is not in conflict with the decision of any other United States Court of Appeals.

STATUTORY PROVISIONS INVOLVED

The federal diversity jurisdiction statute provides in part:

> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $50,000.00, exclusive of interest and costs, and is between-

---

* All references herein to "App." refer to the appendix filed by the Petitioner.

(1) citizens of different states

28 U.S.C. § 1332(a)(1).

The federal statute governing actions removable provides in part:

> (a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a state court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

28 U.S.C. § 1441(a).

The federal statute governing procedure after removal provides in part:

> (c) A motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under § 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.

28 U.S.C. § 1447(c)

The federal statute governing procedure after removal also provides:

> (d) An order remanding a case to the state court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the state court from which it was removed pursuant to § 1443 of this title shall be reviewable by appeal or otherwise.

28 U.S.C. § 1447(d).

The Missouri statute providing for interlocutory dismissal of a retailer whose liability is based solely on his status as a seller in the stream of commerce provides, in part:

> **Motion to dismiss, defendant whose liability is as seller in stream of commerce requirements, procedure — order of dismissal to be interlocutory**
>
> 1. A defendant whose liability is based solely on his status as a seller in the stream of commerce may be dismissed from a products liability claim as provided in this section.
>
> 2. This section shall apply to any products liability claim in which another defendant, including the manufacturer, is properly before the court and from whom total recovery may be had for plaintiff's claim.
>
> 3. A defendant may move for dismissal under this section within the time for filing an answer or other responsive pleading unless permitted by the court at later time shown.

> 6. No order of dismissal under this section shall operate to divest a court of venue or jurisdiction otherwise proper at the time the action was commenced. A defendant dismissed pursuant to this section shall be considered to remain a party to such action only for such purposes.
>
> 7. An order of dismissal under this section shall be interlocutory until final disposition of plaintiff's claim by settlement or judgment and may be set aside for good cause shown at anytime prior to such disposition.

Mo. Rev. Stat. § 537.762 (1987) (full text at App. 14a).

STATEMENT OF THE CASE

Robert Carney and Sheila Carney filed their Petition for Damages against BIC Corporation and Clifford Massie d/b/a Massie One Stop in The Circuit Court of the City of St. Louis on July 28, 1994. In that civil action, plaintiffs sought damages for the wrongful death of their two year-old son under theories of strict liability and negligence in connection with the defendant's design, manufacture and sale of butane lighters. BIC Corporation is a New York Corporation with its principal place of business in Connecticut. Clifford Massie is a resident of Missouri, as are respondents Robert and Sheila Carney. Therefore, diversity of citizenship did not exist.

On February 23, 1995, Clifford Massie, d/b/a/ Massie One Stop and respondents Robert and Sheila Carney, entered into a stipulation for interlocutory dismissal in which defendant Massie remained a party for purposes of venue and jurisdiction pursuant to Mo. Rev. Stat. § 537.762 (1987). App. 11a. On March 3,

1995, BIC Corporation removed the civil action to the United States District Court for the Eastern District of Missouri, contending that diversity of citizenship existed and that removal was proper under 28 U.S.C. § 1446. Respondents Robert and Sheila Carney filed their Motion for Remand on March 9, 1995, pursuant to 28 U.S.C. § 1447(c) on the grounds that diversity of citizenship warranting removal did not exist because the dismissal of Clifford Massie d/b/a Massie One Stop was interlocutory, and Massie remained a party for purposes of venue and jurisdiction pursuant to Mo. Rev. Stat. § 537.762. On July 14, 1995, the Honorable Donald J. Stohr, Judge of the United States District Court for the Eastern District of Missouri, entered an order remanding the civil action to the Circuit Court of the City of St. Louis. App. 8a.

BIC Corporation filed its Petition for Mandamus with the United States Court of Appeals for the Eighth Circuit on August 21, 1995. The Petition for Mandamus was denied on November 2, 1995. App. 13a. BIC Corporation filed a Notice of Appeal on August 14, 1995, seeking to overturn the remand order of July 14, 1995. On July 8, 1996, the Eighth Circuit Court of Appeals dismissed BIC's appeal pursuant to 28 U.S.C. § 1447(d) for lack of jurisdiction, holding that the remand order was based solely upon the district court's conclusion that removal jurisdiction did not exist and that the district court's consideration of Mo. Rev. Stat. § 537.762 was in no way separate from the jurisdictional determination. App. 6a. The Court of Appeals concluded that the district court made no determinations concerning substantive rights of the parties, that the remand order fell squarely within 28 U.S.C. § 1447(d) and, therefore, was not subject to review on appeal. App. 6a-7a.

REASONS FOR DENYING THE WRIT

Rule 10 of the Rules of the Supreme Court of the United States provides that review on a writ of certiorari is not a matter of right, but of judicial discretion, to be granted only for compelling reasons. Section (a) of the Rule indicates that the character of the reasons the court considers includes where a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter. In this case, appellate review has been, and is being sought of a remand order based solely upon a lack of diversity and subject matter jurisdiction. Remand orders issued under 28 U.S.C. § 1447(c) and invoking the grounds specified therein — that the court lacks subject matter jurisdiction— are immune from review by appeal or otherwise pursuant to 28 U.S.C. § 1447(d). *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1975). There is no conflict in the federal courts of appeal over the reviewability of remand orders. Since this Court's decision in *Thermtron*, federal appellate courts, including the Eighth Circuit Court of Appeals, have consistently reviewed remand orders which affect the substantive rights of the parties apart from any jurisdictional decision because those remand orders are based upon grounds outside of 28 U.S.C. § 1447(c). The remand order now under consideration is not based upon a district court's determination that a federal statute is unconstitutional, but rather is based solely upon a lack of diversity and subject matter jurisdiction. The remand order decides no issues that affect the substantive rights of the parties. It is precisely the type of remand order that Congress intended, through the enactment of 28 U.S.C. § 1447(d), to not be reviewable by appeal or otherwise.

Remand always results in a reduction of federal jurisdiction, and every statute or rule of law that precludes removal due to its interlocutory effect would constitute an unconstitutional

attempt to oust federal jurisdiction if BIC's reasoning is followed.

The Missouri statute in question neither increases, nor decreases, federal jurisdiction. If diversity jurisdiction does not exist at the time of filing, the application of Mo. Rev. Stat. § 537.762 does nothing to create diversity. If diversity does exist at the time of filing, the application of Mo. Rev. Stat. § 537.762 does nothing to destroy diversity. The interlocutory effect of dismissal of the retailer under Mo. Rev. Stat. § 537.762 is no different than the effect of various other procedural rules that likewise have been held not to create diversity and removal jurisdiction.

I.

FEDERAL APPELLATE COURTS HAVE CONSISTENTLY HELD THAT REMAND ORDERS BASED UPON THE GROUNDS STATED IN 28 U.S.C. § 1447(c) ARE IMMUNE FROM REVIEW UNDER 28 U.S.C. § 1447(d) AND REMAND ORDERS BASED UPON GROUNDS OUTSIDE OF 28 U.S.C. § 1447(c) ARE SUBJECT TO APPELLATE REVIEW.

Remand orders issued under 28 U.S.C. § 1447(c) are not reviewable by appeal or writ of mandamus. This is true whether or not that order might be deemed erroneous by an appellate court. *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 96 S. Ct. 584, 46 L. Ed. 2d 542 (1976). *In Re Business Men's Assur. Co. of America*, 992 F.2d 181 (8th Cir. 1993). As long as a district court's remand is based on a timely raised defect in removal procedure or on lack of subject matter jurisdiction— the grounds for remand recognized by 28 U.S.C. § 1447(c)— a court of appeals lacks jurisdiction to entertain an appeal of the remand order under 28 U.S.C. § 1447(d). *Things*

Remembered, Inc., v. Petraca, __ U.S. __, 116 S. Ct. 494 (1995); *Thermtron, supra. See, e.g., Gravitt v. Southwestern Bell Tel. Co.*, 430 U.S. 723, 97 S. Ct. 1439, 52 L. Ed. 2d 1 (1977) (remand order plainly within the bounds of 1447(c) and hence unreviewable by the Court of Appeals, by mandamus or otherwise); *Hansen v. Blue Cross of California*, 891 F.2d 1384 (9th Cir. 1989) (district court's decision that insurance plan was not subject to ERISA was not apart from the question of subject matter jurisdiction and remand order based upon lack of subject matter jurisdiction was immune from review under 28 U.S.C. § 1447(d)); *Glasser v. Amalgamated Workers Union Local 88*, 806 F.2d 1539 (11th Cir. 1986) (district court expressly based its decision to remand on lack of subject matter jurisdiction, remand order did not affect substantive rights of the parties and state court was free to consider merits of preemption argument); *Baldridge v. Kentucky-Ohio Transp., Inc.*, 983 F.2d 1341 (6th Cir. 1993) (order remanding wrongful discharge action to state court on ground of lack of jurisdiction was not reviewable; district court's findings were purely jurisdictional, and thus defendants could raise merits of preemption defense in state court); *Bregman v. Alderman*, 955 F.2d 660 (11th Cir. 1992) (where district court indicated that basis of its order to remand was a lack of subject matter jurisdiction, even if erroneous, it was within the bounds of 1447(c) and review was barred by 1447(d)).

Remand orders based on non jurisdictional grounds which are outside the basis specified in 28 U.S.C § 1447(c) are not immune from appellate review. *Thermtron*, 423 U.S. at 345-346, 96 S. Ct. at 590-591; *Hansen, supra* at p. 1387. Thus, appellate review of remand orders has been allowed in the following circumstances, all of which are outside the grounds stated in 1447(c): where review is authorized by another statute, *In Re Resolution Trust Corp.*, 888 F.2d 57, 58-59 (8th Cir. 1989); where there is a substantive ruling of law apart from the jurisdictional

determination that binds the state court, *Pelleport Investors, Inc., v. Budco Quality Theaters, Inc.*, 741 F.2d 273 (9th Cir. 1984); *Waco v. U.S. Fidelity & Guaranty Co.*, 293 U.S. 140 (1934); *In Re Life Ins. Co. of North America*, 857 F.2d 1190, 1993 (8th Cir. 1988); where the district court's discretion to remand pendant state claims is involved, *Carnegie-Mellon University v. Cohill*, 484 U.S. 343 (1988); where the court has discretion to remand after dismissal of a party that destroys diversity, *Mangold v. Analytic Services Inc.*, 77 F.3d 1442 (4th Cir. 1996).

But where remand orders are issued under 28 U.S.C. § 1447(c), and they invoke the grounds specified therein, they are immune from review under 28 U.S.C. § 1447(d). *Farm Credit Bank of St. Paul v. Finstrom*, 888 F.2d 559 (8th Cir. 1989); *In Re Shell Oil Co.*, 932 F.2d 1523 (5th Cir. 1991); *National City Bank v. Coopers and Lybrand*, 802 F.2d 990 (8th Cir. 1986).

II.

THE REMAND ORDER AT ISSUE IS BASED SOLELY ON A LACK OF SUBJECT MATTER JURISDICTION RATHER THAN ON A FEDERAL CONSTITUTIONAL ISSUE AND THERE IS NO CONFLICT IN THE CIRCUITS CONCERNING THE REVIEWABILITY OF REMAND ORDERS THAT TURN ON FEDERAL CONSTITUTIONAL ISSUES.

As stated in the district court's remand order of July 14, 1995, (App. 8a), "the propriety of removal turns on the interpretation of subsections 6 and 7 of § 537.762". After stating that it was not persuaded by BIC's contention that the statute was an impermissible attempt by state law to defeat removal jurisdiction, the district court concluded that "the interlocutory nature of the dismissal pursuant to § 537.762 renders the voluntary-involuntary dismissal distinction insignificant in this

context and makes a removal relying on the dismissal improper.". App. 9a.

By so stating, the district court concluded that the retailer, Defendant Clifford Massie, remained a party for purposes of jurisdiction and venue and, therefore, diversity jurisdiction did not exist pursuant to 28 U.S.C. § 1332 that would entitle BIC to removal under 28 U.S.C. § 1441(b). Pursuant to 28 U.S.C. § 1447(c), the district court concluded that it lacked subject matter jurisdiction and remanded the case to the Circuit Court of the City of St. Louis.

At page 8 of the Petition for Writ of Certiorari, petitioner sets out the basis for its argument that there is a conflict in the circuits and substantial uncertainty in the law concerning the reviewability of remand orders that turn on federal constitutional issues. BIC first contends that the Eighth Circuit Court of Appeals "squarely rejected BIC's argument that the district court's remand order was reviewable because the district court gave the Missouri statute a construction that violates the Supremacy Clause." Next, at page 8, BIC argues that "the Eighth Circuit treated BIC's argument as addressing 'the merits' and held that it could not consider the issue because under 28 U.S.C. § 1447(d) it lacked jurisdiction to review the remand order." BIC concludes by stating at page 9 that "The Eighth Circuit thus rejected the constitutional issue exception as a basis for review of remand orders."

Review of the opinion reveals however, that the Eighth Circuit Court of Appeals, rather than rejecting BIC's constitutional argument, simply chose not to address the merits of BIC's argument, leaving BIC free to challenge the constitutionality of Mo. Rev. Stat. § 537.762 in the state court proceedings after remand.

There was no need to invoke what BIC refers to as the "constitutional issue exception" because the basis of the district court's remand order was clearly a lack of diversity and a lack of subject matter jurisdiction. As stated in the Eighth Circuit's Opinion (App. 6a):

> The remand order in the present case does not come within the *Thermtron* exception, because it was based on a ground specified in 28 U.S.C. § 1447(c) — the district court's determination that it lacked subject matter jurisdiction to hear the action. After noting that the stipulated dismissal provided that, in accordance with Mo. Rev. Stat. § 537.762(6), Massie would remain a party in the action for purposes of venue and jurisdiction, **the district court concluded that the dismissal of Massie did not create removal jurisdiction based upon diversity of citizenship and remanded the present case to Missouri state court. Thus, the remand order was based solely upon the district court's conclusion that removal jurisdiction did not exist. Although the district court applied Mo. Rev. Stat. § 537.762(6), in reaching this conclusion, its consideration of § 537.762(6) was in no way separate from the jurisdictional determination. . . . Thus, the remand order falls squarely within 28 U.S.C. § 1447(d) and is foreclosed from appellate review** (emphasis added).

Because the district court remanded solely on the basis of a lack of subject matter jurisdiction under 28 U.S.C. § 1447(c),

appellate review is precluded by 28 U.S.C. § 1447(d), and there was no authority to consider the numerous exceptions cited previously that permit appellate review on grounds outside of 28 U.S.C. § 1447(c).

BIC relies heavily on *In Re TMI Litigation Cases Consolidated II,* 940 F.2d 832 (3d Cir. 1991), to establish the existence of a constitutional issue exception, and a conflict among the circuits due to the Eighth Circuit's failure to apply that exception in this case. However, in *TMI,* the district court's remand order was based upon the court's determination that the Price-Anderson Amendments Act of 1988 was unconstitutional. The reason for the Third Circuit's decision to review the remand order in *TMI* is clearly stated at pages 844-845 of the opinion:

> . . . we cannot conclude that, in the situation presented here, Congress intended that § 1447(d) operate to prevent appellate review of the district court order. We are confident that the jurisdictional determination of the district court, **resting as it did upon the conclusion that the entire statutory scheme authorizing removal was unconstitutional, was not the type of federal subject matter jurisdiction decision intended to be governed by the terms of or the policy underlying § 1447(c) and 1447(d). Section 1447(d) therefore has no application. In order to fall within sections 1447(c) and 1447(d), a remand order must be based upon a finding that removal was not authorized by Congress** (emphasis added).

Also important to the Third Circuit's decision to review in *TMI* was the district court's clearly expressed belief that there

was substantial ground for a difference of opinion concerning the issue of constitutionality, and the fact that the district court certified the question for immediate appeal pursuant to 28 U.S.C. 1292(b). *TMI, supra* at p. 847.

TMI allowed review because the district court, which clearly had both federal question jurisdiction and removal jurisdiction, triggered remand by declaring the Price-Anderson Amendments Act of 1988 unconstitutional, and holding that Congress exceeded its authority by creating a federal forum for public liability actions. At page 835, the *TMI* court recognized that the district court's determination with respect to subject matter jurisdiction rested not on any failure to satisfy the jurisdictional requirements of the Amendments Act, but rather upon the court's conclusion that the Amendments Act itself was unconstitutional, which were grounds clearly outside of 28 U.S.C. § 1447(c). The district court's decision had obvious binding implications in the state court proceedings below if the appellate court refused to review the remand order since the district court clearly had jurisdiction pursuant to the express provisions of the federal statute and its decision could not be considered purely jurisdictional.

In contrast to *TMI*, the remand order now under consideration is not based upon either the district court's or the appellate court's ruling of unconstitutionality, but rather upon a lack of subject matter jurisdiction. The Eighth Circuit's opinion points out that the remand order was based solely upon the district court's conclusion that subject matter jurisdiction was lacking and that the district court's consideration of Mo. Rev. Stat. § 537.762 was in no way separate from the jurisdictional determination. Recognizing that the district court made no determinations concerning the substantive rights of the parities, and pointing out that it did not reach the merits of BIC's challenge to the remand order, the Eighth Circuit held

the remand order not reviewable under 28 U.S.C. § 1447(d), and dismissed BIC's appeal. The result is that the decision of the district court was only jurisdictional, and neither the district court nor the appellate court reached issues on the merits which preclude BIC from raising the issue of constitutionality in the state court proceeding on remand.

The issue of whether a district court's determination in connection with remand involves substantive issues binding on the parties apart from the jurisdictional issue was discussed in *Hansen v. Blue Cross of California*, 891 F.2d 1384 (9th Cir. 1989). In *Hansen*, at page 1388, the Ninth Circuit Court of Appeals points out that in *Pelleport Investors, Inc. v. Budco Quality Theaters, Inc.*, 741 F.2d 273 (9th Cir. 1984) which it also decided, it held the District Court's remand order, involving the enforceability of a forum selection clause, reviewable because the District Court "reached a substantive decision on the merits *apart* from any jurisdictional decision. At page 1388, The *Hansen* court then went on to hold that the District Court's remand order, based upon the decision that the insurance plan at issue was not subject to ERISA, was not reviewable on appeal because "the district court's decision that Hansen's plan was not subject to ERISA, rather than being apart from the question of subject matter jurisdiction, was necessary to determine whether such jurisdiction existed."

While the *Hansen* court declined to decide whether a state court would be required to invoke *res judicata* to determinations involved in reaching the district court's decision, that question has been answered by numerous federal courts of appeal. Both the issue of reviewability of remand orders, and the *res judicata* effect of jurisdictional findings was discussed in *Glasser v. Amalgamated Workers Union Local 88*, 806 F.2d 1539 (11th Cir. 1986). In rejecting appellant's argument that the remand order was reviewable on appeal, the Eleventh Circuit responded as follows at page 1540:

> It is true that, as in *Clorox* and *Pelleport*, the decision underlying the remand order involved a conclusion of substantive law. However, unlike in those cases, here the substantive law decision *related* to the question of jurisdiction; the remand order did not affect the substantive rights of the parties. . . . **In particular, the court did not reach the merits of the preemption argument. The state court may in fact rule that ERISA does not preempt appellee's state law claims and that appellees must proceed, as appellants contend, under subsection 1132(a)(1)(B) of ERISA . . .** (emphasis added).

Findings of a district court made for the purpose of determining federal jurisdiction have no preclusive effect on a state court. *See, e.g., Soley v. First National Bank of Commerce,* 923 F.2d 406 (5th Cir. 1991) (district court's finding that plaintiff's claims were not within the boundaries of ERISA was a jurisdictional finding that could be reviewed by state court); *In Re Business Men's Assur. Co. of America,* 992 F.2d 181 (8th Cir. 1993) (where district court declined to rule whether ERISA would control remanded action, remand order not reviewable under 28 U.S.C. § 1447(d) where based on lack of federal question jurisdiction); *Baldridge v. Kentucky-Ohio Trans., Inc.*, 983 F.2d 1341 (6th Cir. 1993) (district court's findings purely jurisdictional and defendants not precluded from raising merits of preemption defense in state court); *Nutter v. Monongahela Power Co.*, 4 F.3d 319 (4th Cir. 1993) (district court's jurisdictional findings regarding federal preemption in order remanding workers' compensation retaliation claim to state court would have no preclusive effect in state court).

In many respects this case turns on issues similar to those involved in *Linton v. Airbus Industrie,* 30 F.3d 592 (5th Cir. 1994). In *Linton*, following removal on grounds of both diversity of citizenship and federal question jurisdiction, stipulations were entered into that had the effect of recognizing one of the plaintiffs to be a "stateless" person, thereby destroying diversity. Also, a previous ruling by the district court had rejected the Federal Sovereign Immunities Act (FSIA) as a basis for federal question jurisdiction. Even though the stipulations regarding citizenship had been entered into post-removal, and the district court wrongly concluded that the post-removal events destroyed diversity, the remand order was held not reviewable pursuant to 28 U.S.C. § 1447(d) because it was based upon lack of subject matter jurisdiction. At footnote 38 at page 599 of the *Linton* decision, the court recognized that it did not matter whether the stipulation was considered pre-removal or post-removal, the fact remained that the remand was based upon lack of diversity and subject matter jurisdiction and was not reviewable.

Another important aspect of *Linton* is the appellate court's conclusion, stated at page 598, that the district court's finding that FSIA was inapplicable to the defendants (which destroyed federal question jurisdiction) was a jurisdictional finding that had no preclusive effect and could be freely reviewed by the state court upon remand, relying upon *Waco v. United States Fidelity & Guaranty Co.*, 293 U.S. 140, 55 S. Ct. 6, 79 L. Ed 244 (1934). The only consequence of the district court's ruling was that the defendants "must have the merits of their FSIA claims determined by a state court rather than by a federal court." *Linton, supra* at 598.

The importance of what preclusive effect the district court ruling will have on the state court upon remand has been a common theme in the cases cited above. While in *In Re Life Ins. Co. of North America*, 857 F.2d 1190, 1993 (8th Cir. 1988)

the Eighth Circuit held a remand order reviewable under a preemption analysis, *Baldridge v. Kentucky-Ohio Trans., Inc.*, 983 F.2d 1341 (6th Cir. 1993) at page 1347 points out the fact that *In Re Life Ins. Co. of North America* was decided before recognition of the difference between complete preemption and the preemption defense. In *In Re Business Men's Assur. Co. of America*, 992 F.2d 181 (8th Cir. 1993), a case decided after *In Re Life Ins. Co. of North America, supra,* the Eighth Circuit followed the preemption analysis of *Hansen, Glasser, Baldridge, Soley,* and *Linton* by denying review of a remand order where the district court concluded it did not have federal question jurisdiction, and where the district court declined to rule whether ERISA would control the remanded action, thus leaving that decision to the state court. Even though the district court considered whether the insurance plan in question was an ERISA plan, the issue was considered only in the context of determining the issue of federal question jurisdiction, and the state court was free to decide the issue on remand.

In this case, the only effect of the district court's ruling, as well as that of the Eighth Circuit Court of Appeals, is the fact that the case is to be tried, and BIC's constitutional arguments considered in state court.

III.

THE INTERLOCUTORY EFFECT OF MO. REV. STAT. § 537.762 DOES NOT RESULT IN AN IMPERMISSIBLE DESTRUCTION OF FEDERAL REMOVAL JURISDICTION.

In truth, it is the interlocutory nature of dismissal under Mo. Rev. Stat. § 537.762 that BIC really complains of. Because the dismissal was interlocutory, it did not constitute a voluntary act which resulted in a final dismissal of a non-diverse defendant

so as to give rise to removal jurisdiction. *Machinsky v. Johnson & Johnson Medical Inc.*, 868 F. Supp. 269 (E.D. Mo. 1994); *Saylor v. General Motors Corp.*, 416 F. Supp 1173 (E.D. Ky. 1976). In *Machinsky*, an interlocutory dismissal without prejudice granted by the court to a retailer under the Mo. Rev. Stat. § 537.762 (the statute now under consideration) was held not to result in a final dismissal of the non-diverse defendant so as to permit removal even though the plaintiff did not oppose the motion to dismiss and suggested language to be used in the order of dismissal.

Under the "voluntary-involuntary rule" adopted by the Eighth Circuit, a case that is nonremovable on its initial pleadings for lack of diversity can only become removable by the plaintiff's voluntary act that definitely and clearly indicates his intention to abandon or discontinue the action as to the non-diverse defendants. *In Re Iowa Mfg. Co.*, 747 F.2d 462 (8th Cir. 1984); *Power v. Norfolk Ry. Co.*, 778 F.2d 468 (E.D. Mo. 1991). The rationale of the voluntary-involuntary test is the prevention of premature removals in cases where the issue of the resident defendant's dismissal has not been fully determined in the state court. *Machinsky, supra* at p. 270; *Saylor v. General Motors Corp.*, 416 F. Supp. 1173 (E.D. Ky. 1976).

Because of their interlocutory nature, numerous other procedural activities have been held not to constitute dismissal of a non-diverse defendant so as to give rise to diversity and removal jurisdiction *See, e.g., Thrapp v. Armstrong World Industries, Inc.*, 767 F. Supp. 822 (N.D. Tex. 1991) ("high-low" settlement between plaintiff and non diverse defendant was not an abandonment of action against non diverse defendant such that action could thereafter be removed on grounds of diversity); *Pulse One Com. v. Bell Atlantic Mobile Systems*, 760 F. Supp. 82 (D. Md. 1991) (summary judgment order removing non diverse individual plaintiffs was interlocutory and not

sufficiently final to warrant removal); *Doe v. Cutter Biological,* 774 F. Supp. 1001 (E.D. La. 1991) (even though non diverse defendants not served, case can nevertheless lack complete diversity and cannot be removed); *Aydell v. Sterns,* 677 F. Supp. 877 (M.D. La. 1988) (plaintiff's instruction in petition to withhold service as to non diverse defendants was not a clear and definite expression to terminate action against them so as to warrant removal); *Higgins v. Pittsburgh-Des Moines Co.*, 635 F. Supp. 1182 (S.D Tex. 1986) (non diverse defendant who was involved in partial settlement remained interested party in case and his liability needed to be submitted to jury, thus partial settlement was not a final dismissal).

BIC has also contended that respondents may not be allowed to "stipulate away" federal jurisdiction. Yet, federal courts have held that as long as they occur before removal, amendments and stipulations limiting the jurisdictional amount in controversy can be effective to prevent removal. *St. Paul Mercury Indemnity Co., v. Red Cab Co.*, 303 U.S. 283, 58 S. Ct. 586, 82 L. Ed. 845 (1938); *Matter of Shell Oil Co.*, 970 F.2d 355 (7th Cir. 1992); *Woods v. Massachusetts Protective Ass'n,* 34 F.2d 501 (E.D. Ky. 1929).

The point is that the statute now under consideration is no more impermissibly destructive of federal removal jurisdiction than the other procedural activities referred to above. The statute was enacted with a clear purpose in mind. It allows retailers whose only source of liability is having placed the product in the stream of commerce to avoid potentially expensive litigation while at the same time protecting innocent plaintiffs against the possibility of insolvency of designers and manufacturers who are the primary defendants. The retailers remain a party for purposes of venue and jurisdiction and the dismissal is interlocutory, subject to being set aside for good cause at any time until final disposition. App.15a.

CONCLUSION

For the reasons previously stated, the petition for a writ of certiorari should be denied.

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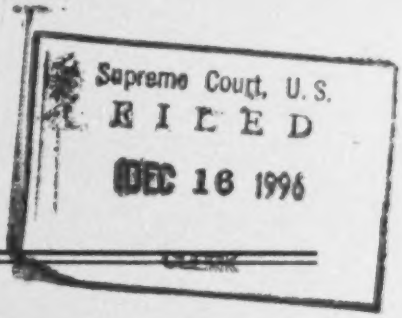

No. 96-694

IN THE

Supreme Court of the United States

OCTOBER TERM 1996

BIC CORPORATION,

Petitioner,

v.

ROBERT CARNEY and SHEILA CARNEY,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals For The Eighth Circuit

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REPLY FOR PETITIONER

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REPLY FOR PETITIONER

BIC Corporation's Petition for Certiorari seeks a determination by this Court whether remand orders based on lack of subject matter jurisdiction in the district court are reviewable in the court of appeals, notwithstanding 28 U.S.C. § 1447(d), where the remand turns on the decision of a federal constitutional issue. BIC demonstrates there that such an exception to the bar to appellate review has been recognized and that the decision below in this case necessarily turns on a rejection of that exception to non-reviewability. Respondents' nineteen-page opposition, for all of its convoluted argumentation, fails completely to come to grips with these fundamental contentions.

1. Respondents' principal line of argument is the assertion that the federal courts uniformly adhere to a blanket rule foreclosing appellate review in every case where remand purports to rest on a lack of subject matter jurisdiction. Opp. at 7-9. Thus, they submit, "[t]here was no need to invoke what BIC refers to as the 'constitutional issue exception' because the basis of the district court's remand order was clearly a lack of diversity and a lack of subject matter jurisdiction." *Id.* at 11.

This argument misunderstands the issue presented and amounts to a simple denial that any constitutional issue exception has been recognized in the case law or should be considered. The issue raised in *In re TMI Litigation Cases Consolidated II*, 940 F.2d 832 (3d Cir. 1991), *cert. denied*, 503 U.S. 906 (1992), the additional cases acknowledging the constitutional issue exception with approval, and in this case, is whether a remand order based on jurisdictional grounds becomes reviewable, notwithstanding 28 U.S.C. § 1447(d), where the lack of federal subject matter jurisdiction follows directly from the determination of a federal constitutional issue.

a. In *TMI*, the Third Circuit held that a remand order was reviewable on appeal where it turned on the district court's finding that the Price-Anderson Act was unconstitutional, and thus the statute's provisions giving jurisdiction to the district court were invalid. There, as here, the immediate reason for the remand was the district court's lack of subject matter jurisdiction. The remand order was found reviewable anyway, precisely

because the lack of jurisdiction followed from the resolution of a constitutional issue. Respondents thus are simply wrong in asserting that "[a]s long as a district court's remand is based on . . . lack of subject matter jurisdiction . . . a court of appeals lacks jurisdiction to entertain an appeal of the remand order . . . ." Opp. at 7.

b. Respondents' effort to distinguish *TMI*, Opp. at 12-13, does little more than reprise, by lengthy quotation and summary, the circumstances of that case, in which the district court's lack of jurisdiction resulted from its invalidation of the federal statutory scheme under which removal was authorized. Nothing in Respondents' discussion diminishes the conflict between the holding of *TMI* and the Eighth Circuit's decision in this case that the district court's remand order was not reviewable despite the fact that the district court's purported lack of jurisdiction followed from its determination that the statute at issue, Rev. Stat. Mo. § 537.762 (1987), was not unconstitutional.

Respondents argue that in *TMI* the district court had invalidated the statute in question on federal constitutional grounds, whereas here the Missouri statute was upheld and there was no "ruling of unconstitutionality." Opp. at 13. Beyond that statement, Respondents offer no explanation of why a constitutional issue exception to the rule of non-reviewability should be confined to cases where remand depends on findings of unconstitutionality. While Respondents would be free to urge such a distinction in arguing the merits of the case, no obvious reason appears why remands based on the denial of constitutional claims should be any less entitled to appellate consideration than those resulting from the affirmance of constitutional challenges. As the Third Circuit recognized in *TMI*, the important policy issue is that Congress could not have intended that district courts would be able to make federal constitutional determinations that are unreviewable (and thus potentially inconsistent), but allowing constitutional decisions to be "couched in terms of section 1447(c) and followed by a remand order" means that they "could *never* be reviewed." 940 F.2d at 845 (emphasis in original).

2. Nor do Respondents make any headway with their apparent claim that there was no resolution of a constitutional issue in either the district court or the Eighth Circuit. Opp. at 10. In the district court, Respondents' motion to remand was granted notwithstanding BIC's argument that an interpretation of the Missouri statute so as to support remand would be constitutionally invalid, because it would allow a state statute to destroy federal subject matter jurisdiction. Pet. at 8 n.3. In ordering remand, the district court thus clearly rejected BIC's constitutional argument. Pet. App. 9a.

In the Eighth Circuit, BIC again raised this constitutional argument, and specifically invoked the Supremacy Clause. Pet. at 8 n.3. The Eighth Circuit acknowledged the argument, Pet. App. 4a, but found it to be one going to "the merits" as to which it lacked jurisdiction. The court of appeals thus was explicit in its holding that it was without jurisdiction to review the remand decision, even with regard to the constitutional issue that had been raised and rejected in the district court.

3. Petitioner finds baffling Respondents' further contention that BIC is left "free to challenge the constitutionality of Mo. Rev. Stat. § 537.762 in the state court proceedings after remand." Opp. at 10. Absent grant of certiorari by this Court, the rejection of BIC's constitutional argument in the district court and the Eighth Circuit's refusal to review that ruling foreclose further consideration of the constitutional issue raised. Certainly the state court is without power to consider anew the propriety of removal in this case, and it is only in the context of removal that the constitutionality of Rev. Stat. Mo. § 537.762 (as applied by the district court) is a relevant issue.[1]

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[1] Respondents' citations to cases in which courts of appeals upheld remand orders, on the ground that the district courts lacked jurisdiction because federal law did not preempt state law (Opp. at 15-17), are thus irrelevant. The courts of appeals noted in some of those cases that the state courts were not precluded from reaching their own conclusions on preemption and applying federal law. The situation here is radically

4. Finally, the argument against certiorari is not at all enhanced by Respondents' effort to justify the Missouri statute, as applied, on the ground that it is simply an "interlocutory dismissal" provision. Opp. at 17-19. This is not the time to determine the merits of the constitutional challenge to Rev. Stat. Mo. § 537.762 beyond observing, for the reasons set forth in the Petition (at 11-12), that the contention is substantial. Respondents' effort to minimize the force of the claim by characterizing dismissals under the statute as interlocutory does not alter the fact that the district court's interpretation of the statute still allows parties to confer or deny jurisdiction to the federal court by a simple stipulation that changes not at all the identity of the parties or the substance of the claims.[2]

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different: the issue is whether the legal fictions of the Missouri statute (as construed by the district court) bar access to federal court for defendants in the position of BIC, and a state court cannot grant a party access to federal court under any circumstances. The claim that BIC can somehow raise its constitutional argument in the state court is thus wholly false.

[2] That the district court's interpretation of the Missouri statute makes it nothing more than a device for product liability plaintiffs to destroy federal diversity jurisdiction by fraudulent joinder (*i.e.*, the naming of local retailer defendants, followed quickly by stipulated dismissals) is confirmed by the fact that all of the noble statutory objectives cited by Respondents (Opp. at 19) could be achieved by a simple dismissal of the local retailer without prejudice, a dismissal that would not prevent removal based on diversity jurisdiction.

CONCLUSION

For the foregoing reasons and those stated in the Petition, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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December 16, 1996